

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
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)	
Amendment of the Commission's Rules)	WT Docket No. 97-82
Regarding Installment Payment Financing for)	
Personal Communications Services (PCS))	
Licenses)	
)	
)	

Comments of the Office of Advocacy, U.S. Small Business Administration

The Office of Advocacy of the United States Small Business Administration (Advocacy)¹ respectfully submits these comments regarding a further notice of proposed rulemaking (FNPRM) in which the Federal Communications Commission (FCC) proposes to modify rules governing re-auction of Personal Communications Services (PCS) spectrum licenses on the C- and F-Blocks. Current rules provide that C- and F-Block licenses be offered exclusively to designated entities, essentially small businesses. C-Block spectrum is offered in 30 MHz and 15 MHz licenses and F-Block spectrum is offered in 10 MHz licenses. The licenses being offered in the upcoming re-auction include some of the nation's most populous markets, and are largely drawn from licenses previously held by NextWave Personal Telecommunications, Inc. (NextWave). The FCC proposes dividing the 30 MHz C-Block licenses into three licenses of 10 MHz each, and proposes lifting the small-business eligibility restrictions on some C-Block licenses, as well as all F-Block licenses. Advocacy opposes the FCC's proposal to open the C- and F-Blocks to bidding by large companies. However, should it do so nonetheless, the FCC

¹ Congress established the Office of Advocacy in 1976 by Pub. L. No. 94-305 to represent the interests of small business within the Federal government. See 15 U.S.C. §§ 634 (a)-(g), 637. Advocacy serves as a focal point for concerns regarding the government policy as it affects small business. Advocacy develops proposals for changes in Federal policy and communicates proposals to the Federal agencies. See 15 U.S.C. § 634(c)(1)-(4).

should open fewer licenses to large business bidding than the FCC proposes in its FNPRM.

1. The FCC offers no reason to depart from its current policy, and should not do so.

Discussion surrounding C-Block eligibility issues has been underway for some months, within the context of petitions for waiver of the rules filed by SBC Communications Inc. (SBC) and Nextel Communications, Inc. (Nextel).² These companies raised long-standing arguments that changes in the industry and experience with the C-Block auction process make the designated entity set-aside undesirable and demonstrate that small business cannot compete in the wireless communications marketplace. Advocacy has argued that the only change that has occurred since the FCC last reiterated the set-aside policy has been the successful C-Block re-auction to designated entities.³ In fact, since the FCC eliminated installment payments for the C-Block, and successfully re-auctioned licenses in this spectrum, not one additional licensee has declared bankruptcy or failed to provide competitive services. SBC's and Nextel's arguments, in Advocacy's view, thinly disguise their desire for more spectrum, nothing more.

Advocacy has anxiously awaited the FCC's views on the subject. Originally, the FCC established the designated entity set-aside and has since assiduously defended it against Nextel's multiple attempts to gain C-Block spectrum. As the FCC has repeated throughout the C-Block licensing process, small businesses need help gaining access to spectrum in order to provide competitive wireless services; PCS spectrum is in such demand that bidding credits alone would be insufficient to permit small business to compete at auction with heavily capitalized large

² See Petition of SBC Communications Inc. for Waiver of the Eligibility Requirements of 47 C.F.R. § 24.709 for the PCS Frequency Blocks C and F Auction to Begin on July 26, 2000 ("SBC Petition"), DA 00-191, January 21, 2000, Petition for Expedited Rulemaking or, in the Alternative, Waiver of the Commission's Rules ("Nextel Petition"), DA 00-191, January 31, 2000.

³ See Comments in Opposition, filed by Advocacy, DA 00-191, February 22, 2000, Reply Comments, filed by Advocacy, DA 00-191, March 1, 2000, letter filed by Advocacy, DA 00-191, April 10, 2000, and Comments in Opposition, filed by Advocacy, WT Docket No. 97-82, April 17, 2000.

entities.⁴

But this time, the FCC seems to accept the arguments of SBC, Nextel, and others, that times have changed and the eligibility restrictions should be loosened.⁵ The FCC offers scant reason for accepting, without specific and explicit information, the views of the large companies. The FCC offers no sound public policy reason for eliminating or loosening eligibility restrictions on any C- and F-Block license.

The FCC finds that few small businesses are actually providing service and that many C-Block licenses have become subject to bankruptcy proceedings.⁶ But this occurred before the FCC amended its rules to eliminate installment payments. The FCC offers no new data on the small business PCS picture since it amended its rules and offered defaulted C-Block licenses for re-auction. In point of fact, no small business has declared bankruptcy since the re-auction, all have paid for their licenses in full, and many are rolling out services. The only circumstance that has changed is the FCC's removal of installment payments, which has created a climate in which small PCS firms can offer competitive services.

Moreover, while the FCC finds limited small business success in the top twenty markets, it does not consider that many of the top licenses were held by NextWave and thus have been out of reach of other potential licensees. Based on one business's failure, then, the FCC seems to find truth in big business's argument that Los Angeles is no place for rural folk. The FCC needs

⁴ See Installment Payment Financing for Personal Communications Services (PCS) Licensees, Order on Reconsideration of the Second Report and Order, WT Docket No. 97-82 (1998), Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, Fourth Report and Order, WT Docket No. 97-82 (1998), Installment Payment Financing for Personal Communications Services (PCS) Licensees, Second Report and Order, WT Docket No. 97-82 (1997), and Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Fifth Memorandum Opinion and Order, PP Docket No. 93-253 (1994).

⁵ The FCC states, "Since 1994, circumstances in the industry have changed. In light of significant technology developments and increased demand for spectrum, it is appropriate for the Commission to consider reassessing the proper balance of its spectrum policies." FNPRM, paragraph 25.

⁶ See FNPRM, paragraph 20.

more specific evidence before making such drastic policy changes.

The FCC cites increased demand for spectrum and changes in technology as sound reasons to allow big business a shot at C-Block licenses.⁷ This implies that demand for spectrum or swift technology development comes as a surprise and was not to have been anticipated. But big businesses have wanted this spectrum all along, as evidenced by the tireless efforts Nextel has made over the years to get its hands on the C-Block. While it is true that wireless spectrum is in great demand, that is no reason to place greater value on the needs of large business. New spectrum will soon find its way into the hands of the large providers, interested in providing nationwide service with advanced “3G” technologies. They do not need the C-Block as well.

The FCC suggests that bidding credits will be sufficient to assure small business access to PCS spectrum.⁸ This is a turnaround from prior FCC findings that bidding credits are not sufficient for PCS because of the large sums of money involved.⁹ The FCC offers no reason why this previous finding is no longer valid. Why is the FCC reluctant to make its reasoning transparent? Could it be that there is no rationale?

The FCC should give its past C-Block remedies a chance to work. In response to the financial trouble experienced by many small licensees after the original auction (which was perhaps due to easy money and irresponsible bidding), the FCC decided to eliminate installment payments. The FCC then retrieved and re-auctioned the defaulted licenses. While it may be too early to declare small business PCS a success, the re-auction was successful, and the licensees paid for their licenses and are rolling out service. The NextWave bankruptcy has grabbed

⁷ See FNPRM, paragraph 26.

⁸ See FNPRM, paragraph 16.

⁹ See Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, Fourth Report and Order, WT Docket No. 97-82 (1998), paragraph 16, Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Fifth Report and Order, PP Docket No. 93-253 (1994), paragraphs 16, 121.

headlines but does not change the fact that the FCC's remedy appears to have prevented a repeat of the financial difficulties that beset the first batch of C-Block licensees. NextWave and other bankrupts have failed spectacularly, but small business has not failed. The FCC should give small businesses a chance to get their systems running after the last re-auction, before attempting a more disruptive change to its rules. The FCC should offer NextWave's licenses for re-auction according to its existing rules.

2. If the FCC changes its rules, it should open bidding on fewer licenses than proposed, and increase bidding credits for small and very small businesses.

Advocacy believes the FCC should not alter its C- and F-Block eligibility rules. No party, including the FCC, has demonstrated the necessity of such a change. While large service providers may be experiencing a spectrum shortage, this is no reason to cut the heart out of small business PCS. For these reasons, Advocacy is absolutely opposed to any modifications to the current C- and F-Block eligibility restrictions. Advocacy would only consider modifying this total opposition if the FCC adopts more modest changes than it proposes, as outlined below.

If the FCC insists on permitting large businesses to alleviate congestion with C-Block spectrum, it should make fewer licenses available to large businesses than it proposes in its FNPRM. And it should increase bidding credits for open licenses, as it proposes. If the largest markets are where spectrum shortages are most acute, this is where the FCC should open bidding, and modestly. The FCC should not open licenses in every market, and should limit the amount of open spectrum it offers in the largest markets.

a. The FCC should open bidding for only 10 MHz in the very largest markets.

The FCC proposes opening two of three 10 MHz licenses to big business bidding in all markets with populations of 2.5 million or more persons, the top 17 markets. The FCC should raise this threshold, to permit big businesses to bid in fewer markets. The FCC also should

permit open bidding on only 10 MHz of spectrum in these top markets. The FCC should preserve the remaining 20 MHz as a single license, for exclusive bidding by designated entities. The FCC has presented no evidence to indicate that small businesses cannot provide wireless services to the largest markets in the country. Many of the large-market licenses have been held up in bankruptcy, so it is difficult to predict whether a small business can compete. But it is impossible to conclude that small business cannot compete in these markets. In light of this dearth of evidence, the FCC should minimize its loosening of bidding restrictions and leave a full 20 MHz for designated entities in the largest markets.

The FCC should find a middle ground between accommodating big business spectrum needs in these most populous markets and encouraging small business entry into these same markets. 20 MHz, rather than 10 MHz, is a more appropriate amount of spectrum with which to start a new business, as it permits a full range of wireless voice and data services. 10 MHz is suitable for providing more limited services and is an adequate amount for spectrum relief. The FCC need not encourage large businesses to establish new PCS businesses in these largest markets; other spectrum offerings, such as the upcoming “3G” auction, will be available for building new nationwide services. The FCC’s aim should be to provide some spectrum relief for service providers that may be experiencing congestion on existing systems, yet continue to promote diversity among license holders.¹⁰

Thus, Advocacy recommends that the FCC reserve 20 MHz for designated entities in the top markets and permit large businesses to bid on 10 MHz in these same markets. Current bidding restrictions should remain in effect for licenses in all smaller markets.

¹⁰ In this regard, Advocacy does not oppose the FCC’s proposal to permit open bidding on previously unsold 15 MHz C-Block licenses. If there is no demonstrated interest in these licenses by designated entities, it is appropriate to use these licenses for spectrum relief as well.

b. The FCC should prohibit open bidding on licenses in all smaller markets.

The FCC proposes open bidding on one of three 10 MHz licenses in markets with populations under 2.5 million persons.¹¹ But spectrum shortages justify loosening PCS bidding restrictions, if at all, in only the very largest markets.¹² Those markets with the highest populations and highest percentages of wireless customers have experienced service limitations due to inadequate spectrum, and this may be a serious problem. But this does not justify widespread big business participation in the C-Block. Small business can bring increased competition to even these largest markets, and the introduction of another wireless service provider in these markets would ease spectrum shortages just as surely as giving additional spectrum to existing licenses would.

There is no evidence that small businesses cannot compete in the PCS marketplace, even in the big cities. Thus, spectrum relief and assuring access to spectrum for small business are competing demands, and should be accommodated with care. Spectrum relief should only occur in the largest markets, where it is most needed, and then only to the extent it will not impede the FCC's and Congress's goal to distribute wireless licenses among a variety of applicants, including small businesses and businesses owned by minorities and women.¹³ In smaller markets, where spectrum shortages are not as acute, the FCC should not alter current C-Block eligibility, and should retain the single 30 MHz C-Block license.

c. The FCC should prohibit open bidding for F-Block licenses.

The FCC proposes open bidding for all F-Block licenses.¹⁴ The FCC presents no reason for abandoning eligibility for F-Block licenses. The FCC indicates that the F-Block has been

¹¹ See FNPRM, paragraphs 28, 30.

¹² Again however, Advocacy would not oppose bidding credits on unsold 15 MHz licenses, even in smaller markets.

¹³ See Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Fifth Report and Order, PP Docket No. 93-253 (1994).

¹⁴ See FNPRM, paragraph 31.

free of the difficulties that have plagued the C-Block. The logical conclusion from this statement is that the F-Block should be left alone, but the FCC draws the opposite conclusion, apparently forgetting that it proposes loosening C-Block eligibility in part *because* of the problems that licensees of that spectrum have faced.¹⁵ If the C-Block had not experienced widespread defaults, the FCC would not be exploring changes to the rules. Therefore, the FCC should not entertain changes to the rules for the relatively trouble-free F-Block.

d. The FCC should raise bidding credits for all licenses subject to open bidding.

The FCC proposes to raise its bidding credits for small businesses from 15 percent to 25 percent and its credits for very small businesses from 25 percent to 40 percent.¹⁶ The FCC has repeatedly indicated that the high capitalization requirements of PCS render bidding credits inadequate to permit small businesses to compete at auction with large businesses.¹⁷ Only setting aside a portion of PCS spectrum would assure that small businesses have a realistic opportunity to enter the PCS market and compete for customers. Nonetheless, the FCC seems inclined to remove the set-aside, at least for some licenses. Therefore, Advocacy supports the FCC's proposal to increase bidding credits, in an effort to provide something of a level competitive playing field for small business. If the FCC also takes Advocacy's recommendation to permit open bidding for only 10 MHz in just the largest markets, increasing bidding credits for these 10 MHz may be adequate to assure that small business has a reasonable opportunity to

¹⁵ Perhaps the FCC is operating throughout this proceeding upon the unsupported premise that set-aside is not necessary to assure small business participation in PCS. The FCC does state, with regard to the smoother F-Block, "Accordingly, we may not be faced with the same equity considerations in maintaining a set-aside of F block spectrum as we are for the C block." FNPRM, paragraph 31. This non sequitur suggests that the C-Block problems are the "equity considerations" for maintaining the set-aside. But these problems form the FCC's argument for *loosening* the set-aside. In fact, the set-aside is based on the congressional policy to encourage diversity among license holders. The FCC repeatedly has found that bidding credits are insufficient to assure small business access to PCS spectrum. The FCC does not explain its change in policy.

¹⁶ See FNPRM, paragraph 41.

¹⁷ See footnotes 3 and 8.

compete in the PCS marketplace.

3. Conclusion

Advocacy is disappointed that the high-profile failure of NextWave and others to pay for their licenses has brought the FCC to the point of changing its well-reasoned C- and F-Block designated entity policy. The FCC offers no sound reasons for changing its policy. The C-Block bankruptcies have tied up many valuable licenses for years, perhaps exacerbating spectrum shortages but certainly keeping service from the public for far too long. But the fact of the matter is that the FCC has already resolved the problem, by removing installment payments. The FCC has successfully re-auctioned initial defaulted licenses to small businesses that have responsible financing and that are providing service or preparing to. The FCC should permit this modest but important rule change to bear fruit. Until recently, NextWave has managed to hold onto its vast number of licenses, which includes many large markets. This has obscured the fact that the FCC's amended C-Block rules have already effected a successful re-auction of PCS C-Block spectrum, exclusively to designated entities. The FCC should not abandon its commitment to small business PCS because of fatigue over its long fight with one licensee. The FCC should not change its C-Block rules at this time.

If the FCC insists on using the C-Block to provide spectrum relief to large service providers, despite providing no rationale, Advocacy will consider tempering its opposition only if the FCC permits open bidding on only 10 MHz in the very largest markets. This would preserve small business's ability to enter PCS markets and bring competitive and innovative services to the public, while allowing existing service providers and their customers relief from congestion.

Respectfully submitted,

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